JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CRIMINAL APPEAL NO. 53/94

BEFORE: **THE HON. MR. JUSTICE RATTRAY, P.**
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

GREGORY JOHNSON v. REGINAM

Lord Gifford, Q.C. and Kenneth Porter
for appellant

Bryan Sykes, Deputy Director of Public Prosecutions,
for the Crown

22nd, 23rd, 24th April and 3rd June, 1996

PATTERSON, J.A.:

On the 10th June, 1994, in the Home Circuit Court, Gregory Johnson was convicted of the non-capital murder of Michael Minott.

On the 24th April, 1996, at the conclusion of the hearing of his application for leave to appeal against his conviction, we granted the application and announced that we would treat the hearing of the application as the hearing of the appeal. We allowed the appeal against conviction, quashed the conviction, and directed a judgment and verdict of acquittal to be entered. Our reasons now follow.

Michael Minott was murdered on the 3rd September, 1991, at about 10:45 p.m. at the corner of Bay Farm Road and Penwood Road in St. Andrew, as he sat on a stump with his head resting in the lap of Maxine Taylor, his girlfriend. He was shot in the head at close range, the bullet entering his forehead, travelling through the brain and exiting behind the left ear. Michael Taylor, a man known only as "Shit Teeth", and Paul Elliott, the sole eyewitness called by the prosecution, were also said to be present and to have witnessed the gruesome murder. The prosecution's case was that the appellant it was who shot the deceased. Paul Elliott testified that he saw the appellant ride a bicycle passing by him within arm's length, and that he went to where the deceased and Maxine Taylor were, came off the bicycle, took a short gun from his waist, and "he point right to Michael's head and shot him one shot". That bullet wounded Maxine Taylor as well. The appellant then looked around, remounted his bicycle and rode off. The deceased was rushed to the Kingston Public Hospital where he was pronounced dead.

Two days after the incident, a warrant was issued for the arrest of the appellant, but he was not taken into the custody of the Jamaican police until the 22nd July, 1992, when he was handed over by the United States Marshall in Florida. He denied shooting the deceased.

The prosecution's case depended to a large extent on the visual identification of the appellant by the sole eyewitness called by them, Paul Elliott. At the close of the prosecution's case, the defence submitted that the quality of the visual identification evidence was too poor for it to be left to the

jury, and that the judge should withdraw the case from them. The learned trial judge did not accede to the submission, and his rejection gave rise to the first ground of appeal before us. Elliott said that the night of the murder was not the first time he had seen the appellant. He had seen the appellant "about '85, '86" at a dance when the appellant sang one song. They did not speak. The next time he saw the appellant was about 7:00 p.m. on the 2nd September, 1991, the night before the incident, standing with "friends" at the corner of Conway Road and Balcombe Road. They did not speak. On the night of the incident, the 3rd September, 1991, he saw the appellant at about 9 o'clock speaking in a telephone booth at the corner of West Bay Farm Road and Penwood Road where he had gone along with the deceased, his brother Keith Minott and Maxine Taylor. Keith pointed out the appellant to the deceased, whereupon the deceased addressed the appellant in these words: "Pussy, what you a deal wid the big man so." The appellant did not reply; he came out of the booth, stood within touching distance of the witness for "a good while", and then he jumped on his bicycle and rode off without saying a word. The area was brightly lit. The next time he saw the appellant was when he rode by him "on the same bicycle" at about 10:45 p.m. and then shot the deceased at the corner of Bay Farm Road and Penwood Road. That area was also brightly lit.

That was the sum total of the evidence of visual identification, up to the time of the murder, because the next time that the witness said he saw the appellant was in the dock on the 30th June, 1993, when he gave evidence in an aborted trial. It was contended that because of (a) the period of time which

elapsed between the sighting of the appellant in 1985 or 1986 and the murder, (b) the period of time between the murder and the sighting in the dock, and (c) the failure to hold an identification parade, the identification evidence was "thoroughly dubious and unsatisfactory", and the case ought not to have been left for the consideration of the jury.

In our view, the sighting of the appellant five or six years before the incident, without more, could not form the basis for a satisfactory dock identification of the appellant. There was nothing peculiar about that sighting which would have impacted on the memory of the witness, although he said the appellant gave "a good performance". However, the sightings on the night before the murder and, more so, twice on the night of the murder, must have given some weight to the dock identification. ***R. v. Cartwright*** [1914] 10 Cr. App. R. 219 is authority for the well-established principle that it is undesirable for a witness to be invited to identify a defendant for the first time in the dock at the trial. At common law, a trial judge has a discretion to reject such evidence, and will probably do so where the evidence is tenuous, for example, where the evidence establishes that the defendant was a stranger to the witness prior to the incident and there is no other evidence to connect the defendant with the offence charged. This is done in the discharge of his function to ensure that a defendant is afforded a fair trial according to law. But that is not to say that such evidence is inadmissible or worthless. In an appropriate case, it may not be rejected, but it will be left for the jury to assess the weight to be attached to it, which will depend on whether or not there is any independent

evidence to support its correctness. Where a witness has picked out a defendant on an identification parade, it enhances the weight to be placed on his identification evidence. As Lord Lowry pointed out in ***Wayne Watt v. R.*** (unreported) (Privy Council Appeal No. 25 of 1992 - delivered 25th March, 1993), "a parade can confirm the witness' ability to pick out the person identified." In the instant case, an identification parade was not held, and there are possibly two reasons why not. Elliott did not give a statement to the police until the 30th June, 1993, about a week before the aborted trial, and some 19 months after the murder and 10 months after the appellant had been arrested. By then the appellant had gone before the court several times. In his statement, Elliott told the police that he had seen the appellant "on numerous occasions at various dances." The lapse of time in the first instance may have rendered an identification parade nugatory, and the witness' statement would have given the impression that he knew the appellant well, and it was, therefore, a recognition case. The value of an identification parade in such circumstances would be extremely limited. In the event, the identification of the appellant by the witness amounted to no more than a dock identification.

But that was not the only evidence that the prosecution depended on in this regard. Detective Inspector Ivanhoe Thompson testified that on seeing the appellant in Miami, he cautioned him and told him that he would be taken back to Jamaica and arrested for the murder of Keith and Michael Minott, and that the appellant replied, "Me willing fi go for me never shoot them", and more importantly, "A dis dem dis me and me goh round a Binns Road goh tell

Prentice and Prentice goh shoot them." This bit of evidence was capable of supporting the identification evidence of Paul Elliott that he saw the appellant at the telephone booth shortly before the murder, and that Michael Minott, the deceased, had spoken disparagingly or disrespectfully to the appellant. The appellant's reaction to what was said to him by the deceased must have made some impact on the witness' memory. In our view, there was sufficient evidence of identification of the appellant for the learned judge to leave the issue for the jury to assess its value. The exercise of the learned judge's discretion in this regard cannot be faulted. The fact that the no case submission was made in the presence of the jury was not made a ground of appeal as counsel for the appellant frankly admitted that the irregularity did not result in any prejudice to the appellant. We are in full agreement.

The next ground of appeal complained of the wrongful admission of indirect hearsay evidence. The prosecution led evidence from Detective Sergeant Cecil Lewis that on the 3rd September, 1991, he received a report and started investigations and as a result, two days later, he "obtained warrants for the arrest of Gregory Johnson otherwise called Gregory Nose". He did not know that person before, but he had "recorded statements in this matter", but he could not recall from whom. The complaint was that no such statement would have been collected from Paul Elliott, since his statement was not given until 19 months after the murder. The evidence, therefore, must have conveyed to the jury that person or persons who had not been called as witnesses had identified the appellant as the murderer. In ***Delroy Hopson v. R.*** (unreported)

Privy Council Appeal No. 35 of 1992 - delivered 13th June, 1994, their Lordships' Board considered the effect of similar evidence admitted in that case. The investigating officer was asked in examination-in-chief the following:

> "**Q:** ...Now did you speak to him?
>
> **A:** Yes, sir.
>
> **Q:** Did he speak to you?
>
> **A:** Yes, sir.
>
> **Q:** And I believe in police language he told you something?
>
> **A:** Yes, sir.
>
> **Q:** After what he told you, corporal, did you make any decision to look for anybody in particular?
>
> **A:** Yes, sir.
>
> **Q:** I mean as part of your investigations?
>
> **A:** Yes, sir."

Their Lordships said:

> "This evidence was, of course, hearsay, highly prejudicial and wholly inadmissible. There was no suggestion that the victim's statement to the Corporal was a dying declaration."

Their Lordships made it quite clear that the evidence of the corporal "could only be understood as implying that the victim had named the appellant as his attacker." The admission of such evidence required the conviction of the appellant to be set aside.

In our judgment, the instant case cannot be distinguished from ***Hopson's*** case (supra). The evidence of Detective Sergeant Cecil Lewis went no

further than to show that he obtained warrants for the arrest of the appellant on two charges of murder. His evidence had no probative value whatsoever, it was hearsay, inadmissible and must have conveyed to the jury that the appellant had been identified by person or persons other than Elliott as the murderer. The prejudicial effect of such evidence could not be cured in the judge's summation, and for that reason alone, the conviction could not stand.

But there were further complaints not only of the admission of other inadmissible evidence, but also of the conduct of the prosecution. The appellant was being tried on an indictment containing only one count charging him for the murder of Michael Minott. However, evidence was led by the prosecution which must have made it quite clear to the jury that the appellant had been charged for another murder committed on the same night as the one for which he was being tried. Such evidence was not, in our view, tendered as "similar fact" evidence, and undoubtedly was inadmissible and highly prejudicial. It must have had the effect of raising in the jury's mind, at the very least, a suspicion that the appellant was of bad character and was disposed to the sort of crime with which he was charged. We will mention, as examples, bits of the evidence to which we were referred. Evidence was led from Detective Sergeant Lewis of his visit to the Kingston Public Hospital on the night of the 3rd September, 1991, as a result of a report he received. Then followed the damaging evidence led by prosecution counsel:

"**Q:** ...How many bodies you saw that night?

A: That night?

Q: Yes.

"**A:** Two.

Q: Now, you see that it appeared to have gunshot wounds all over the body?

A: Yes, sir.

Q: Did you look at the other one?

A: It had gunshot wounds as well.

Q: You commenced investigations?

A: Yes, sir.

Q: And, during your investigations, did you prepare anything?

A: Yes, sir.

Q: What you prepared?

A: I obtained warrants for the arrest of Gregory Johnson otherwise called Gregory Nose."

Inspector Ivanhoe Thompson testified that he went to Miami to escort the appellant back to Jamaica. The relevant parts of the transcript of his testimony read:

"**Q:** ...Did you know of an alleged shooting in that area sometime in September, 1991?

A: Yes, sir.

Q: Involving two persons?

A: Yes, sir.

Q: Two deceased?

A: Yes, sir.

Q: Now did you participate in that investigation?

A: Yes, sir."

The witness then testified that he went to Miami, saw the appellant, cautioned him and this is what follows:

> "**Q:** What you said to him?
>
> **A:** I told him that I should be escorting him to Jamaica to arrest him for the murder of two persons.
>
> **Q:** Did you tell him the name of the two persons?
>
> **A:** Yes, sir.
>
> **Q:** Which names you told him?
>
> **A:** Keith and Michael Minott."

But what is more, this is what transpired during cross-examination of the appellant by the prosecution counsel (p. 476):

> "**Q:** You see, Mr. Nose, I am suggesting to you that you shot down the deceased Michael Minott and his brother and you had left to the United States after you did it.
>
> **A:** That's incorrect, sir.
>
> **Q:** Michael Minott we are dealing with in particular now.
>
> **MR. FRANKSON:** M'Lord, I am objecting to that suggestion.
>
> **HIS LORDSHIP:** He has re-phrased it."

There were a number of improper comments made by the prosecution counsel in the presence of the jury, which must have fortified any suspicion they may have had of the appellant's involvement in a second murder on the night in question. Defence counsel, in his cross-examination of Detective Sergeant Lewis, wished to elicit the state of mind of the witness at various times during

his investigations, and during arguments as to the admissibility of such evidence, prosecution counsel raised an objection as to what was being said by defence counsel, and continued in this manner (pp. 135-136):

> "**MR. WILDMAN:** To what he has said, m'Lord, because these things are being said to create an impression in the minds of the jury. The prosecutor would have liked to bring out everything but we are bound by the rules of evidence. But if my learned friend, Mr. Witter is permitted to do that, which on my case, it is against the rules of evidence, but I would have no personal objection to it; subject to one fact, my Lord, that the prosecutor...
>
> **HIS LORDSHIP:** Don't say too much now, you know.
>
> **MR. WILDMAN:** Also the prosecution will be allowed to ask the officer similarly, if based on the investigations, if it is revealed that both persons shot down both of them, m'Lord. That is the issue in the case, but because we are bound by the rules of evidence, we can't do certain things. If Mr. Witter wishes to flout the rules, the prosecution has to do things and let the jury hear everything.
>
> **HIS LORDSHIP:** Mr. Witter, I really don't think the state of mind of the officer is relevant.
>
> **MR. WITTER:** We have come to different parts...
>
> **HIS LORDSHIP:** Yes?
>
> **MR. WITTER:** What counsel has said is so desperately unethical. Did my Lord hear that it was his view that he could ask this witness, and did my Lord hear him say in the presence of these jurors, could that possibly arise, m'Lord.
>
> **HIS LORDSHIP:** Certainly. I agree with you, that Mr. Wildman went a little too far.
>
> **MR. WITTER:** Deliberately.

> "**HIS LORDSHIP:** I will have to tell the jury that, all of that is irrelevant. We are here to determine the guilt or innocence of the accused persons so far as the death of Michael Minott is concerned. So, let us get on."

Later on, the question of the relevance of certain photographs was being canvassed, and this is what was said (pp. 160-161):

> "**MR. WITTER:** Now, m'Lord, I am going to pass you one of the copies of the photographs, my Lord, and you will see where I am going. I am to ask Your Lordship to study the index which the prosecution gave to us.
>
> **HIS LORDSHIP:** Was it in this?
>
> **MR. WITTER:** In this particular case, this indictment.
>
> **MR. WILDMAN:** That's the problem, Mr. Witter is leading us down a certain PATH, which if I have to take, Mr. Witter may not like it, you know my Lord. Because, the prosecution has one count of murder against this accused man, although, it should have been otherwise. Mr. Witter knows why it is not more than one count of murder. If Mr. Witter is insisting that that other murder is relevant to this case, he knows that that count is still on the file, and when the relevant witness is called, the prosecution is bound by certain evidence; which I am prepared to go, it would make the prosecution's case even stronger. Why is he insisting and say that it has to do with the case when he knows that that index is not related to this count on the indictment?
>
> **HIS LORDSHIP:** One has to be guarded.
>
> **MR. WILDMAN:** Mr. Witter is doing this deliberately, so I have to insist so, that the jury can understand the total picture. The way counsel conducts the case is important. The conduct of counsel, the way he conducts the case, try and pull things over the eyes of people to fool them. That is important. When this accused man was pleaded

> "first, how many counts of murder was he pleaded to? Mr. Witter knows that.
>
> **HIS LORDSHIP:** No, let us not get into that.
>
> **MR. WILDMAN:** Well, I say no more."

The prosecution counsel persisted in his comments (pp. 187-188):

> **"MR. WILDMAN:** You see my Lord, why I think alerting Your Lordship, I am trying to be fair to the accused, too, in the sense that the prosecution is alleging certain things against this accused man, and Your Lordship is well aware of what transpired before this case commenced of what it is the prosecution is saying. And, why it is and instead of also investigating or trying the death of Keith we are only trying the death of Michael. Your Lordship knows the reason for that. Mr. Witter knows that but Mr. Witter throughout the case has made both of them an issue which for the prosecution, we would have loved to have both of them but because Mr. Witter knows that the witnesses are not available, my Lord, certain things had to be done."

It was contended that counsel for the prosecution made "improper and unfounded allegations" against defence counsel on numerous occasions during the trial which were of such character and frequency as to prejudice the fair trial of the appellant. We were pointed to many forensic confrontations and repartee between prosecution counsel and defence counsel over the nine days that the trial occupied. We need not refer to them seriatim. Suffice it to say that such outrageous conduct before a judge and jury was quite improper and should not have been allowed to occur. The sage words of Lord Hewart, LCJ in ***R. v. Wadey*** [1936] 25 Cr. App. R. 104 should always be borne in mind by prosecution counsel:

> "Counsel entrusted with the public task of prosecuting accused persons should realise that one of their primary duties is to be absolutely fair."

There is no doubt that, for the proper administration of justice, prosecution counsel and defence counsel should be allowed to perform their respective task fearlessly, and to raise such issues and advance such arguments as are relevant to the case. But there are certain professional standards that every counsel is bound to observe. The dignity of the court must never be compromised. Counsel must not cast aspersions or make improper imputations on the integrity of the opposing counsel, unless in the most extreme circumstances, and then, only in the absence of the jury. Such conduct emanating from prosecution counsel in the presence of the jury creates prejudice in the minds of the jury and inhibits a fair and impartial trial.

The question arose whether in the present case, the appellant had been afforded the substance of a fair trial, having regard not only to the admission of inadmissible evidence but also to the reprehensible conduct of counsel. A judge has a supervisory role in every trial. It is his duty to decide what evidence is admissible, what evidence must be left to the jury, to stop irrelevant evidence being led before the jury, and to ensure that the course of the trial is scrupulously fair. Even in the absence of irregularity in a trial, a conviction may be quashed in exceptional circumstances if, due to the conduct of counsel, a defendant's case was not fairly placed before the jury (see ***Sankar v. The State of Trinidad & Tobago*** [1995] 1 W.L.R. 194). It matters not how strong the case may be against a defendant, he has a right to a fair trial. A judge

must guard against the admission of inadmissible evidence, and it is a settled principle of law that a trial judge, in a criminal trial, always has a discretion to refuse to admit evidence which is tendered by the prosecution if, in his opinion, its prejudicial effect outweighs its probative value. (See ***R. v. Sang*** [1980] A.C. 402). The judge's discretion in such a case is based on his duty to ensure that the defendant receives a fair trial. But a judge has a further duty and that is to ensure and maintain the dignity and authority of the court, and to guard against conduct that may improperly influence jurors in the performance of their duties. In order to ensure a fair trial, the case against a defendant must be determined upon only those facts which have been proven by relevant evidence adduced in court in strict conformity with the rules of evidence.

In the present case, counsel for the Crown frankly admitted that he could not defend prosecution counsel's conduct, nor could he refute the fact that the learned trial judge had failed to control counsel. He agreed with the contention that the jury must have been distracted, resulting in the unfair trial of the appellant. We were of the view that the learned trial judge did not exercise such control as was necessary in the circumstances of this case, not only to exclude inadmissible evidence from being led, but also to curb the conduct of prosecution counsel. It is true that there were instances when the learned trial judge rebuked counsel for his conduct in the presence of the jury, and, in one instance, in the absence of the jury. Nevertheless, irreparable damage had already been done, which no amount of warning could cure. In the event, we concluded that the appellant had not been afforded a fair trial

and that a substantial miscarriage of justice had occurred with the result that the conviction could not stand.

The irregularities in the trial which have been highlighted were enough for us to quash the conviction. Counsel for the Crown submitted that this was a proper case in which a retrial should be ordered. We did not agree. Taking into consideration the quality of the visual identification evidence, the absence of any identification parade, the late stage at which the sole eyewitness came forward, and the length of time that had elapsed since the murder, we were satisfied that the ends of justice would not be properly served by ordering a new trial.

Accordingly, for the reasons given in this judgment, we arrived at the conclusion stated earlier.